Supreme Court, U.S.
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No. 99-42

IN THE
Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

SUPPLEMENTAL BRIEF FOR PETITIONER

Of Counsel:

J. MICHAEL PERCY
PERCY, SMITH, FOOTE & GADEL
720 Murray Street
Post Office Box 1632
Alexandria, Louisiana 71309
(318) 445-4480

DAVID J. BODNEY
Counsel of Record
PETER B. SWANN
STEPTOE & JOHNSON LLP
Two Renaissance Square
40 North Central Avenue
24th Floor
Phoenix, Arizona 85004
(602) 257-5200

Attorneys for Petitioner

155527

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

In its Petition, CNI noted the pendency of *Boehner v. McDermott*, 1998 WL 436897 (D.D.C. July 28, 1998) (D.C. Cir. No. 98-7156). (Petition, at 7). *Boehner*, which involves issues related to the question presented by CNI's Petition, was decided on September 24, 1999. 1999 WL 742144 (D.C. Cir. 1999).

In *Boehner*, a divided panel of the D.C. Circuit held that the First Amendment did not protect James McDermott, a member of the U.S. House of Representatives, from liability under 18 U.S.C. § 2511(1)(c) for delivering an unlawfully-prepared tape recording of a telephone conversation to the press, allegedly with knowledge of its illegal origins. The Circuit Court refrained from deciding the question presented by CNI's Petition, and noted: "[n]or should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." 1999 WL 742144, at *3.

Though it does not purport to decide the press issues presented by CNI's Petition, the Opinion for the Court in *Boehner* illuminates the practical continuum along which cases involving the First Amendment impact of prohibitions against publication fall. At one end of that continuum, those who engage in illegal conduct to *acquire* information enjoy no First Amendment protection. At the other extreme, members of the public who discuss information of general notoriety cannot be subjected to liability merely because the information was unlawfully acquired in the first instance. For example, there can be no serious argument that members of the public who discuss information pertaining to President Clinton's recent impeachment would be civilly liable for such "disclosures," despite the allegations that some such information was initially acquired in violation of Maryland

law. *See* Md. Cts. & Jud. Pro. § 10-410 (imposing civil liability for knowing disclosures of unlawfully intercepted communications).

In its Petition, CNI seeks to distinguish protected speech from unlawful conduct along that continuum. Its Petition seeks a ruling that the First Amendment protects a newspaper's pub'ication of information relating to a matter of public concern acquired at a public press conference held by a former candidate for public office on a matter of public interest — even where the source (but not the newspaper) acted unlawfully in obtaining the information.

Boehner presented a factual situation only slightly removed from the "conduct" end of the continuum, to which the First Amendment may not apply. Though he did not prepare the tape, Rep. McDermott received it from those who criminally eavesdropped and delivered it to the press, allegedly with knowledge of its illegality and without material comment. The Opinion of the Court concluded that a mere transmission of a tape to the press is not "speech" entitled to First Amendment protection. 1999 WL 742144, at *3. But that Opinion also recognized that "[w]hen a newspaper publishes, it engages in speech." *Id.* at 12.

Boehner also recognized the importance of the scienter requirement that *federal* law imposes as a precondition to liability for disclosure:

> Here, the federal prohibition on disclosure is not dependent on the content of the communication. *And of greatest importance*, § 2511(1)(c) prohibits disclosure of the communication only if the original interception was itself illegal and *only if the person charged with unlawfully disclosing its*

> *contents knew of the illegality*. See 18 U.S.C. § 2511(1)(c). In contrast, the Florida statute [which the Supreme Court held unconstitutional as applied in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989)] had *no* scienter requirement.

1999 WL 742144, at *7 (emphasis added). Unlike the federal statute upheld in *Boehner*, the Louisiana statute challenged in CNI's Petition contains no scienter requirement — as applied, it burdens pure speech without regard to the press' complicity in the illegal acquisition of information.

This Court need not discredit the decision in *Boehner*, nor need it cast doubt on the constitutionality of the federal law at issue in that case, to hold that the imposition of strict liability on the press for disclosure of information already made public offends the First Amendment. Where a newspaper receives information: (1) of public concern, (2) at a public press conference, (3) from a candidate for public office, and (4) does not participate in the acquisition of the information, its publication must be protected. A contrary holding would enable public figures to chill publication on matters of public concern — regardless of its truth — merely by alleging that it was unlawfully obtained by a source at some juncture.

The fundamental value underlying modern First Amendment protection of the press is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). To that end, public figures and public officials are unable to impose civil liability even for *false* statements of fact without proof of actual malice. *Id.*; *Gertz v. Welch*, 418 U.S. 323 (1974). To grant public officials and public figures the means to

silence the press by threatening *strict* liability based *truthful* publications would undermine 35 years of this Court's First Amendment doctrine in cases involving core speech.

The *Boehner* case illustrates the importance of the issues raised in CNI's Petition, and provides an apt avenue for addressing one narrow but central aspect of *Florida Star* that cries out for resolution by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID J. BODNEY
Counsel of Record
PETER B. SWANN
STEPTOE & JOHNSON LLP
Two Renaissance Square
40 North Central Avenue
24th Floor
Phoenix, Arizona 85004
(602) 257-5200

Of Counsel:

J. Michael Percy
PERCY, SMITH, FOOTE & GADEL
720 Murray Street
Post Office Box 1632
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